In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEES' COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1975, and the petition for a writ of certiorari was filed on February 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1972 amendment to Section 28 of the Longshoremen's and Harbor Workers' Compensation Act, making employers liable for successful claimants' attorneys' fees, was properly applied to legal services rendered after its effective date in a case arising out of injuries incurred prior to its effective date.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are set out at Pet. 2-7.

STATEMENT

This case involves a decision by the court of appeals that counsel for respondent Jones should receive legal fees for services rendered in that court in the course of an appeal. The merits of the underlying controversy are before this Court in No. 74-362, certiorari granted, January 20, 1975.

We rely here on the statement of facts contained in our brief on the merits in No. 74-362. Briefly, in 1972 Charles Jones was awarded compensation for a totally disabling injury he had suffered while employed in 1960 by petitioner Intercounty. Intercounty and its insurer, Hartford Accident & Indemnity Company, requested injunctive relief against the Deputy Commissioner's compensation order on the ground that Jones had not sought relief within the time provided by Section 22 of the Act. The district court agreed with petitioners' construction of the Act, but the court of appeals, on July 3, 1974, reversed and reinstated the Deputy Commissioner's order (Pet. App. 1-13).

Thereafter, on August 14, 1974, counsel for respondent Mary Jones (the guardian of Charles Jones) requested the court of appeals to award him a fee of $3,000 for his services in representing the claimant on and after December 1, 1972, to be assessed against Intercounty and Hartford pursuant to Section 28 of the Longshoremen's Act, 33 U.S.C. (Supp. II) 928.

Prior to the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, 33 U.S.C. (Supp. II) 901, *et seq.*, the attorney's fee approved by a deputy commissioner or court for a successful claimant's attorney was paid out of the compensation awarded. Section 28(a), 33 U.S.C. 928(a). The 1972 Amendments took effect while this case was pending in the district court. As amended, Section 28 provides that a successful claimant's attorney's fees are set by the tribunal before which the legal services are rendered and that the employer or insurer who erroneously has controverted the claimant's entitlement to compensation, thereby necessitating the attorney's services, is liable for the full amount of the fees.[1] On January 16, 1975, the court of appeals granted a fee in the amount of $750.00 (Pet. App. 53).[2]

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[1]Section 26 of the Act previously had imposed liability for such fees on an employer or insurer that brought court proceedings under the Act "without reasonable ground." See *Overseas African Construction Corp.* v. *McMullen*, 500 F.2d 1291, 1296-1297 (C.A. 2). Under Section 28 as amended, however, the employer's reasonableness in opposing the claim is irrelevant.

[2]A fee had been allowed the attorney by the Deputy Commissioner, in his order of February 8, 1972, for his services to that date. Pursuant to Section 28 (33 U.S.C. 928), the fee, in the amount of $3,500, was to be paid out of the compensation awarded. Respondents have not claimed that the 1972 amendments transfer this liability to petitioners.

Jones' counsel did not appear in the district court proceedings. Although a small portion of his claim for an award of $3,000 was based on services rendered while the case was pending in the district court (see Pet. App. 49-52), the court of appeals' award of $750 (Pet. App. 53) was, as petitioners state (Pet. 9), presumably based on services rendered while the case was before that court.

ARGUMENT

The court below held that attorney's fees for services rendered after the effective date of the amendments should be paid by the employer or its insurer. Accord, *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1297-1298 (C.A. 2); *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1129 (C.A. 9); *Matthews* v. *Walter, C.A. D.C.,* No. 73-2152, decided March 10, 1975. There is no conflict among the circuits,[3] and the decision is supported by the principle of *Bradley* v. *Richmond School Board,* 416 U.S. 696. Accordingly, there is no reason for review by this Court.

1. Petitioners contend that the amendment to Section 28 produces a forbidden "retroactive" increase in the amount of benefits paid on account of injuries that antedated the amendments. This is an inaccurate characterization, and the application of the amendment to this case does not produce a "retroactive" result.

No fee has been sought by the claimant's attorney, nor has any been awarded, for legal services rendered prior to November 26, 1972, the effective date of the amendments. The amendments have not increased petitioners' liability for legal services rendered prior to that date.

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[3]The Benefits Review Board established by the 1972 amendments (33 U.S.C. (Supp. II) 921(b)) consistently has ruled that legal services rendered after the effective date of the amendments should be compensated in accordance with the amended Section 28. See, *e.g., Humble Oil & Refining Co.* v. *Taliaferro,* BRB No. 107-73 at 7 (June 1, 1973); *Suderman Stevedores, Inc.* v. *Sanders,* BRB No. 122-73 at 6-8 (December 28, 1973); *Nardella* v. *Campbell Machine, Inc.,* BRB No. 131-73 at 11-15 (February 22, 1974); *Virginia Hotel Co.* v. *Mills,* BRB No. 133-73 at 9-10 (April 2, 1974); *Director, Office of Workers' Compensation Programs* v. *Gibbs Corporation,* BRB No. 74-104 (July 23, 1974); *Carpenter* v. *Potomac Iron Works, Inc.,* BRB No. 74-208 (February 28, 1975).

The liability for fees for legal services, wherever it is to lie, does not arise until the services have been performed. Here the final events giving rise to petitioners' liability occurred while the amended section was in effect.[4] The liability for fees obviously did not become fixed at the time of the injury, since petitioners could thereafter have avoided any liability for legal fees by acting in such a manner that claimants with valid claims were not forced to incur legal expenses in order to receive the compensation due them. Because the award here covers only legal expenses incurred after the effective date of the amendments, the amendments, as applied to this case, have operated completely prospectively.

2. Even if the imposition of legal fees upon petitioners could be characterized as "retroactive," however, in the sense that fees had been assessed for services rendered before the effective date of the amendments, the decision below would be supported by *Bradley* v. *Richmond School Board, supra. Bradley* held that, under the Emergency School Aid Act, a court of appeals properly could impose attorneys' fees for services rendered prior to the effective date of the Act, because there is a "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Id.* at 711.

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[4]The cases relied upon by petitioners deal with substantial increases in compensation benefits to be paid on account of prior injuries. These cases are inapposite because in them the event—the injury—that finally fixed liability antedated the change in the compensation provisions. Moreover, only one of the state cases cited by petitioners deals with attorneys' fees, and all of the state cases involve compensation laws characterized by the state courts as "contractual" in nature. Consequently, a change in payment schedules under such laws might alter a "contract." The Longshoremen's and Harbor Workers' Act is not a "contractual" workers' compensation statute; the employer and employee cannot elect or refuse coverage or alter its terms in any particular.

In any event, the award here was not "retroactive" in that sense. There certainly is no "manifest injustice" in requiring petitioners to pay, according to the terms of Section 28, for legal services rendered after the effective date of the amendments, and the liability for which could have been avoided by declining to resist meritorious claims for compensation.[5] Nor is there either statutory direction or legislative history indicating that the amended Section 28 is inapplicable to cases of this sort. Therefore, under *Bradley*, no other course was open to the court below.

3. Petitioners assert that the decision below conflicts with *Addison* v. *Bulk Food Carriers, Inc.*, 489 F. 2d 1041 (C.A. 1), and *Bell* v. *Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla.), which, petitioners assert, held that the date of an employee's injury is the critical date for "vesting" of rights and responsibilities (Pet. 16-17). This is inaccurate. These two cases concerned only the application of Section 18(a) of the Amendments, 86 Stat. 1263, amending Section 5 of the Act, 33 U.S.C. (Supp. II) 905.

In the amended Section 5 Congress abrogated the judicial cause of action formerly available to longshoremen for injuries resulting from the "unseaworthiness" of the vessel in whose service they were working. Congress also abolished the vessel's action for indemnity against the stevedore based on breach of a "warranty of workmanlike performance" of the stevedoring contract. See S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-12; H. Rep. No. 92-1441, 92d Cong., 2d Sess. 4-8. The courts found a congressional intent that available admiralty remedies with respect to injuries incurred prior to the amendment

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[5]No provision for attorney's fees is made unless the claimant prevails.

remain unaffected, because the last event fixing liability had occurred prior to the amendments. 118 Cong. Rec. 36382, 36384. But this intent related only to the amendments' abrogation of unseaworthiness and workmanlike performance suits; it provides no basis for assuming that Congress also intended that liability for subsequently incurred legal expenses is to be determined by the law in effect on the date of the injury. *Addison* and *Bell* do not bear on the amendment to Section 28.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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